

Catholic University Law Review

Volume 35
Issue 1 *Fall 1985*

Article 7

1985

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Recommended Citation

Janet Alberghini, *Structuring Determinate Sentencing Guidelines: Difficult Choices for the New Federal Sentencing Commission*, 35 Cath. U. L. Rev. 181 (1986).

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COMMENTS

STRUCTURING DETERMINATE SENTENCING GUIDELINES: DIFFICULT CHOICES FOR THE NEW FEDERAL SENTENCING COMMISSION

The Comprehensive Crime Control Act of 1984¹ has ushered in a wave of changes to existing federal criminal law² that constitutes the most sweeping

1. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 2200 (1984) *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 2. Enactment of the Comprehensive Crime Control Act of 1984 is the culmination of a more than decade-long bipartisan effort by Congress, with the cooperation of successive administrations, to overhaul and recodify the federal criminal code. The new law incorporates significant changes in the areas of sentencing, bail reform, criminal forfeiture, drug trafficking, and computer fraud. Other highlights of the Act include the establishment of a fund to compensate victims of violent crime and a substantial revision of the insanity defense, which includes shifting the burden of proof from the prosecutor to the defendant when the insanity defense is raised. The Act also encompasses substantive revisions to several federal statutes relating to the commission of violent and nonviolent serious offenses. Finally, the statute includes a number of procedural amendments to the criminal code to improve the operation of the criminal justice system. *See* S. REP. NO. 225, 98th Cong., 1st Sess., *reprinted in*, 1984 U.S. CODE CONG. & AD. NEWS 3182 [hereinafter cited as S. REP. NO. 225].

Although the Act makes some far-reaching changes and improvements to existing federal criminal statutes, it has been criticized for failing to provide the comprehensive reform that Congress set out to achieve when it undertook the code reform initiative more than a decade ago. This criticism points out that the new law has adopted a "piecemeal" approach to code reform and, in this respect, has fallen short of providing a uniform and systematic restructuring of the federal criminal law. *See* Feinberg, *Introduction to Symposium on the Crime Control Act of 1984*, 22 AM. CRIM. L. REV. xi, xi-xii (1985). For a review of earlier criminal code reform legislative initiatives, *see* S. REP. NO. 553, 96th Cong., 2d Sess. (1980). *See also Reform of the Federal Criminal Laws: Hearings before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary*, 92d-95th Cong. pts. I-XIII (1971-1977).

2. *See* diGenova & Belfiore, *An Overview of the Comprehensive Crime Control Act of 1984—The Prosecutor's Perspective*, 22 AM. CRIM. L. REV. 707 (1985) (providing brief summaries of the key provisions in Chapters I through XV of the Act).

The major highlights of the Act include stricter bail requirements which incorporate considerations of 'dangerousness' into pretrial detention decisions; sentencing reform which includes a determinate sentencing system, enhanced penalties, and an end to parole; new provisions giving federal prosecutors authority to seize the assets and profits of drug traffickers; new laws prohibiting tampering with computers, unauthorized use of credit cards and bank-access numbers, and trafficking in counterfeit trademarked goods; an overhaul of the insanity defense which includes placing the burden of proof on the defendant in subsequent commitment procedures; and the establish-

reform movement in the history of the criminal justice system.³ The cornerstone of the Act⁴ and the most far-reaching proposal it contains is federal sentencing reform.⁵ In brief, the new sentencing provisions will limit judicial discretion in sentencing, phase out parole, and abolish current indeterminate sentencing procedures⁶ that have caused wide disparity in the prison terms handed out to similarly situated offenders convicted of relatively similar crimes.⁷ Under the new law, these practices will be replaced with determinate sentencing guidelines fashioned by an independent Sentencing Commission.⁸ The guidelines, once developed by the Commission, will dictate relatively fixed terms of imprisonment to be imposed by federal judges on the basis of the seriousness of the crime committed and the criminal history of the convicted offender.⁹

In proposing this shift to a determinate sentencing system, Congress acknowledged that the rehabilitation theory underlying the current indeterminate system simply had not worked.¹⁰ Nor, Congress concluded, is rehabilitation "an appropriate basis for sentencing decisions."¹¹ The broad discretion exercised by federal judges in sentencing convicted offenders under an indeterminate system has created wide disparity in sentences¹² and

ment of a Crime Victims' Fund, financed by criminal fines and forfeitures, to compensate victims of federal and state crimes through direct and indirect grant programs.

Id. at 707-08 (footnotes omitted).

3. Feinberg, *supra* note 1, at xi.

4. See Rodino, *Federal Criminal Sentencing Reform*, 11 J. LEGIS. 218, 218 (1984) ("Sentencing is the cornerstone of any criminal justice system.").

5. Kennedy, *Foreward to Symposium on the Crime Control Act of 1984*, 22 AM. CRIM. L. REV. vii, ix (1985).

6. Under an indeterminate sentencing system the courts and parole boards are afforded wide discretion in setting prison terms within the minimum and maximum statutorily mandated sentence range for the commission of a particular offense. The actual length of the prison term to be served is thus indeterminate at the time of sentencing and remains unknown to the defendant until the parole board authorizes his release. 1 NATIONAL ACADEMY OF SCIENCES PANEL ON SENTENCING RESEARCH, RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 126 (A. Blumstein, J. Cohen, S. Martin & M. Tonry, eds., 1983). A determinate sentencing system, by comparison, limits judicial and parole board discretion in sentencing by setting fixed, or established sentences within a limited sentencing range. Under determinate sentencing, the sentence is determined, or known to the defendant, at the time the judge announces the sentence. The release date is not determined at a later time by a parole-type agency. *Id.* at 133.

7. See S. REP. NO. 225, *supra* note 1, at 37-50.

8. 28 U.S.C.A. § 994 (West Supp. 1985). See also S. REP. NO. 225, *supra* note 1, at 163-81.

9. 28 U.S.C.A. § 994 (c), (d) (West Supp. 1985).

10. S. REP. NO. 225, *supra* note 1, at 40 n.16.

11. *Id.*

12. S. REP. NO. 225, *supra* note 1, at 41-46.

made a mockery of "individualization" in sentencing by imposing prison terms that were "more dependent on the judge than the offense or the offender."¹³ By contrast, presumptive sentencing guidelines, while not a panacea for inconsistency in sentencing, would provide judges with standard criteria to apply in formulating sentencing decisions and, hopefully, insure greater uniformity, fairness, and certainty in federal sentencing practices.¹⁴

While Congress has made clear that an overriding purpose of federal sentencing reform will be the reduction of disparity in sentencing practices,¹⁵ this goal is to be realized at a time of increasing public demand for the imposition of more stringent penal sanctions as an antidote to "the war on crime."¹⁶ This has led to serious concern and speculation that sentencing reform will become synonymous with longer prison terms and increased prison overcrowding.¹⁷ If this outcome is to be avoided, the Sentencing Commission will need to weigh carefully the impact of sentencing reform on prison population.¹⁸ The Commission cannot focus solely on philosophical concerns nor should its sentencing recommendations be swayed by anti-crime sentiments.¹⁹ Thus, an important function of the Commission will be to produce guidelines that are realistic and workable, as well as fair to both the offender and society.

Although the new federal sentencing reforms have been characterized as revolutionary,²⁰ the concept of a determinate sentencing scheme embodied

The absence of a comprehensive Federal sentencing law and of statutory guidance on how to select the appropriate sentencing option creates inevitable disparity in the sentences which courts impose on similarly situated defendants. This occurs in sentences handed down by judges in the same district and by judges from different districts and circuits in the Federal system. One judge may impose a relatively long prison term to rehabilitate or incapacitate the offender. Another judge, under similar circumstances, may sentence the defendant to a shorter prison term simply to punish him, or the judge may opt for the imposition of a term of probation in order to rehabilitate him.

Id. at 41 (footnotes omitted).

13. Frankel & Orland, *Sentencing Commissions and Guidelines*, 73 GEO. L.J. 225, 226 (1984).

14. S. REP. NO. 225, *supra* note 1, at 65.

15. See S. REP. NO. 225, *supra* note 1, at 39.

16. Frankel & Orland, *supra* note 13, at 232-33.

17. *Id.* at 233.

18. See generally Blumstein, *Sentencing Reforms: Impacts and Implications*, 68 JUDICATURE 129 (1984) (advocating analysis of the impact of a determinate sentencing policy on prison population).

19. *Id.*

20. Reznick, *The New Federal Criminal Sentencing Provisions*, 22 AM. CRIM. L. REV. 785, 785 (1985). "The sentencing provisions of the Comprehensive Crime Control Act of 1984 are intended to reform federal sentencing practices and procedures. Their likely effect, how-

in the Act was developed more than a decade ago.²¹ Indeed, Senator Edward Kennedy shaped these concepts into statutory form and offered the first legislative prescription for a presumptive sentencing model in 1977.²²

The new federal sentencing law also follows in the wake of a variety of sentencing reform movements undertaken by several state legislatures in recent years²³ and, in many respects, parallels the determinate sentencing guidelines system adopted by Minnesota in 1980.²⁴ The federal sentencing provisions are also similar to the determinate sentencing guidelines initiative developed by New York shortly after the enactment of the federal statute.²⁵

The sentencing guidelines commissions in Minnesota and New York have already paved the way for a federal counterpart in developing a workable determinate sentencing formula. In many respects, their efforts will provide a clear blueprint for the federal Commission to follow in the architecture of its own sentencing guidelines model. Their experience, however, suggests this will be a formidable task and that there will be no easy solutions to some

ever, will not be to reform criminal sentencing, but to revolutionize it." *Id.* (footnotes omitted).

21. See generally M. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1972). This work provides a rationale, as well as a general formula, for the structuring of an independent federal sentencing commission. The author proposes the creation by Congress of a "Commission on Sentencing" as a permanent agency with responsibility for "(1) the study of sentencing, corrections, and parole; (2) the formulation of laws and rules to which the studies pointed; and (3) the actual enactment of rules, subject to traditional checks by Congress and the courts." *Id.* at 119 (emphasis in original). The proposal envisions a division of lawmaking functions between Congress and the proposed commission. While Congress would reserve for itself the authority to determine the purposes of sanctions, the basic types of treatment and punishment facilities and the sentence ranges for specified offenses, the commission would prescribe rules of general applicability regarding the factors to be considered in individual sentences, the weight to be accorded to these factors, and the details of sentencing and parole procedures. *Id.* at 122-23.

22. S. 1437, 95th Cong. 1st, Sess., 123 CONG. REC. 13,066 (1977). S. 1437 was the first in a series of sentencing reform measures introduced by Senator Kennedy between 1977 and 1984. Although the sentencing provisions incorporated in S. 1437 were further refined by the Senate during its consideration of subsequent sentencing proposals, the sentencing provisions contained in S. 1437 are, for the most part, carried forward in the Comprehensive Crime Control Act of 1984. See also S. REP. NO. 225, *supra* note 1, at 37.

23. For a brief overview of recent state sentencing reform initiatives, see S. REP. NO. 225, *supra* note 1, at 61-62 nn.111-20. For a more detailed analysis and summary of state and local legislative efforts to reform current sentencing practices, see generally NATIONAL ACADEMY OF SCIENCES PANEL ON SENTENCING RESEARCH, *RESEARCH ON SENTENCING: THE SEARCH FOR REFORM*, *supra* note 6.

24. MINNESOTA SENTENCING GUIDELINES COMMISSION, *THE IMPACT OF THE MINNESOTA SENTENCING GUIDELINES: THREE YEAR EVALUATION* (Sept. 1984) [hereinafter cited as MINN. IMPACT REP.].

25. NEW YORK STATE COMMITTEE ON SENTENCING GUIDELINES, *DETERMINATE SENTENCING REPORT AND RECOMMENDATIONS* (March 1985) [hereinafter cited as N.Y. DETERMINATE SENTENCING REP.].

of the complex and controversial issues that will confront the federal Commission.

Since the inception of federal sentencing reform legislation, concern has been expressed that sentencing guidelines will lead to prison overcrowding, that the duration of sentences will be either too long or not long enough, and that guidelines will result in a shift in sentencing discretion from judges to prosecutors.²⁶ Concern has also been raised over the impact on sentencing guidelines of imposing sentences to concurrent or consecutive terms of imprisonment for the commission of multiple offenses.²⁷

This Comment will discuss how the Minnesota and New York sentencing guidelines commissions resolved these particular concerns, the rationale behind their decisions, and whether their solutions should influence the deliberations of the federal Sentencing Commission in structuring its own determinate sentencing guidelines model. Although these concerns do not represent a comprehensive list of the many issues the federal Commission will need to address in formulating its guidelines model, they are illustrative of the more controversial issues the Commission will confront. Moreover, the success of the guidelines may well hinge on how the Sentencing Commission ultimately chooses to resolve these critical problems.

I. THE LEGISLATIVE MANDATE

The overall goal of the sentencing provisions of the federal Act is the creation, for the first time in the history of the federal criminal justice system, of a comprehensive sentencing policy.²⁸ The statute identifies the basic purposes of sentencing as retribution, deterrence, incapacitation, and rehabilitation.²⁹ It also empowers an independent Commission with broad authority to translate these objectives into a uniform sentencing plan to guide federal judges in their sentencing decisions.³⁰ The Commission is to be composed of seven voting members and one nonvoting member to be appointed by the President with the approval of the Senate.³¹ Voting members will be ap-

26. S. REP. NO. 225, *supra* note 1, at 60. The Senate Report notes two additional concerns that have been raised regarding sentencing guidelines. These include that the guidelines will invest too much power in the Sentencing Commission and that the authority conferred on the Department of Justice to appeal a sentencing recommendation below the guidelines is inappropriate. *Id.*

27. Feinberg, *Law With Order: The New Federal Sentencing Commission*, Boston Globe, Dec. 1, 1985, at 22, col. 1.

28. *E.g.*, S. REP. NO. 225, *supra* note 1, at 37.

29. 18 U.S.C.A. § 3553(a)(2) (West 1985).

30. 28 U.S.C.A. § 994(a) (West Supp. 1985).

31. *Id.* § 991(a). Nearly one year after the enactment of the Comprehensive Crime Control Act of 1984, the President announced the seven nominees that had been selected to serve

pointed for six-year terms and be limited to no more than two terms of service on the Commission.³² At least three Commission members are to be federal judges and no more than four may be from the same political party.³³

The Commission is assigned two primary duties. The first is to promulgate sentencing guidelines for the federal courts to follow in making determinations as to the type and length of sentences to be imposed in criminal cases.³⁴ Such determinations are to encompass recommendations as to whether to impose a sentence of probation, a fine, or imprisonment.³⁵ In imposing terms of imprisonment, the guidelines must also specify whether multiple sentences should be ordered to run concurrently or consecutively.³⁶

The Commission's second, and related, duty is to issue general policy statements concerning the application of the guidelines and any other aspects of sentencing and sentence implementation that would further the purposes of sentencing, as defined by the statute.³⁷ These policy statements must address, but are not limited to, provisions in the sentencing statute relating to sanctions, probation and supervised release, sentence modifications, plea bargaining, temporary release, and prerelease custody.³⁸

The sentence ranges proposed under the guidelines are to be based on a combination of factors characteristic of the offense³⁹ and of the offender.⁴⁰

on the first Sentencing Commission. Nominations Submitted to the Senate, 21 WEEKLY COMP. PRES. DOC. 1085 (Sept. 16, 1985). The nominees were subsequently approved by the Senate. 131 CONG. REC. S13,376-77 (daily ed. Oct. 16, 1985).

32. 28 U.S.C.A. § 992(a), (b) (West Supp. 1985). The initial terms of the first members of the Commission shall be staggered with one member and the Chairman serving terms of six years, three members serving terms of four years, and two members serving terms of two years. *Id.*

33. 28 U.S.C.A. § 991(a) (West Supp. 1985).

34. *Id.* § 994(a)(1).

35. *Id.* § 994(a)(1)(A).

36. *Id.* § 994(a)(1)(D).

37. *Id.* § 994(a)(2).

38. *Id.* § 994(a)(2)(A)-(E).

39. *Id.* § 994(c). This provision sets out several factors relevant to the offense committed that the Sentencing Commission is to examine in determining the appropriate sanction to be imposed under the guidelines. The Commission is directed to take these factors into account only to the extent that they have relevance in determining an appropriate sentence. The statute recommends the following offense characteristics be considered by the Commission in formulating sentencing guidelines:

(1) the grade of the offense; (2) the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense; (3) the nature and degree of harm caused by the offense, including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust; (4) the community view of the gravity of the offense; (5) the public concern generated by the offense; (6) the deterrent effect a particular sentence may have on the commission of the offense by others; and (7) the current incidence of the offense in the community and in the Nation as a whole.

While the statute directs the Commission to examine the relevance of several factors in determining the categories of recommended sentences, the Commission is given considerable leeway to select those offenses or offender characteristics that it considers most pertinent in setting an appropriate sentencing range.⁴¹ The guidelines, however, are to remain entirely neutral with regard to offender status factors such as race, sex, national origin, creed, and socioeconomic rank.⁴²

The statute provides the Commission with one important caveat in formulating its initial set of sentencing guidelines: it cautions the Commission that current sentences do not accurately reflect the seriousness of offenses.⁴³ The statute, therefore, recommends that an appropriate starting point for the Commission in formulating its guidelines would be to ascertain the average length of sentences currently imposed and the length of prison terms actually served under the existing sentencing system.⁴⁴ The Commission, however, need not be bound by these findings and is free to develop its own sentence ranges, provided they are consistent with the sentencing purposes of the statute.⁴⁵

The sentence range imposed for each category of offense and offender is subject to a twenty-five percent limitation on the difference between the maximum and minimum terms of imprisonment recommended under the guidelines.⁴⁶ The guidelines are to specify sentence lengths at or near the maximum terms of imprisonment for defendants who commit a violent crime or have a record of prior felony convictions.⁴⁷ The guidelines should also reflect the appropriateness of imposing a sentence alternative to impris-

Id.

40. *Id.* § 994(d). Several factors characteristic of the offender are to be weighed by the Commission in setting sentencing guidelines. Offender characteristics, like offense factors, are to be considered by the Commission only to the extent that they are relevant in determining the appropriate sentence to be imposed. The statute recommends the following offender characteristics be considered by the Commission in formulating sentencing guidelines:

(1) age; (2) education; (3) vocational skills; (4) mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant; (5) physical condition, including drug dependence; (6) previous employment record; (7) family ties and responsibilities; (8) community ties; (9) role in the offense; (10) criminal history; and (11) degree of dependence upon criminal activity for a livelihood.

Id.

41. *Id.* § 994.

42. *Id.*

43. *Id.* § 994(m).

44. *Id.*

45. *Id.*

46. *Id.* § 994(b).

47. *Id.* § 994(h).

onment upon defendants who are first offenders or are convicted of nonviolent crimes.⁴⁸ Sentences imposed under the guidelines may be appealed by the defendant if the sentence duration exceeds the maximum range designated for that particular category of offense and offender.⁴⁹ Sentences that fall below the specified guidelines range are appealable by the government.⁵⁰

In prescribing presumptive sentence ranges, the Commission is to take into account the impact of the guidelines on the federal prison system.⁵¹ The Commission may make recommendations regarding any change in, or expansion of, existing prison facilities and should strive to minimize the likelihood that the prison population will exceed federal prison capacity.⁵²

The initial set of guidelines promulgated by the Commission and an accompanying report are to be submitted to Congress within eighteen months of the enactment of the statute.⁵³ They will become effective within six months unless Congress acts to prevent their implementation.⁵⁴ Once the initial set of guidelines has been promulgated, the Commission will monitor their implementation and submit annual reports to Congress commenting on the operation of the guidelines and recommending any revisions that appear to be warranted.⁵⁵

II. COORDINATION OF SENTENCING AND CORRECTIONAL POLICIES

Prison overcrowding has been identified as the number one problem confronting correctional institutions today.⁵⁶ The federal prison system is no exception to this disturbing fact.⁵⁷ The total population of federal inmates presently exceeds the total rated prison capacity by over thirty-two per-

48. *Id.* § 994(j).

49. 18 U.S.C.A. § 3742(a) (West 1985).

50. *Id.* § 3742(b).

51. 28 U.S.C.A. § 994(g) (West Supp. 1985).

52. *Id.*

53. Pub. L. No. 98-473, § 235(a)(1)(B)(i), 98 Stat. 1837, 2031 (1984). Under this provision, the Sentencing Commission was to issue its final report to Congress by April 13, 1986. In light of the fact that Commission members did not officially convene until late 1985, it would have been difficult, if not impossible to meet the statutorily mandated deadline. See N.Y. Times, Sept. 11, 1985, at A21, col. 1 (statement of Judge William W. Wilkins, Jr., Chairman of the Sentencing Commission, commenting on the difficulty for the Commission to issue its final report by April 1986). Congress thus voted to extend the deadline for submission of the Commission's report for one year or until April 13, 1987. Sentencing Reform Amendments Act of 1985, Pub. L. No. 99-217.

54. Pub. L. No. 98-473, § 235(a)(1)(B)(ii), 98 Stat. 1837, 2031-32 (1984).

55. 28 U.S.C.A. § 994(n) (West Supp. 1985).

56. Armstrong, *Prudent Use of Prison Space: The Sentencing Improvement Act*, 11 J. LEGIS. 237, 238 (1984).

57. *Id.* at 239.

cent.⁵⁸ This statistic is even more alarming when translated into actual dollar figures. Merely keeping pace with the current rate of increase in prison populations would require annual outlays in prison construction budgets of nearly \$180 billion.⁵⁹ Construction costs, however, only represent the initial expense.⁶⁰ Operational costs, coupled with the hidden costs of lost employment taxes and welfare payments to prisoners' families, further inflate the expense to society of burgeoning prison rolls.⁶¹

While there is a growing trend today toward imposing harsher punishments to combat crime,⁶² the extent to which society and legislatures are willing to support this trend through increased expenditures for the construction and operation of prisons remains uncertain. This is precisely the dilemma confronting the federal Sentencing Commission. The Commission could propose stiffer sentencing penalties and recommend an accompanying expansion of existing correctional facilities.⁶³ The authority to implement this change, however, rests with Congress. On the one hand, if the Commission prescribes sentence ranges that would lead to an increase in prison populations, the guidelines could be undermined or circumvented without the accompanying fiscal support of Congress.⁶⁴ On the other hand, if the

58. United States Department of Justice Federal Prison System, Bureau of Prisons Multi-Year Plan 1 (Feb. 1985). Bureau of Prisons statistics show a dramatic 37% increase in the federal prison population between January 1981 and February 1985. The Bureau attributes this rise in the federal inmate population to recent law enforcement initiatives undertaken by the present Administration emphasizing drug trafficking and organized crime. On the basis of these recent inmate population trends, the Bureau projects further population increases through 1986. In addition, the Bureau predicts this rise will continue as a result of provisions in the Comprehensive Crime Control Act that create several federal offenses in the areas of drug trafficking, violent crime, terrorism, and computer fraud, as well as minimum mandatory sentences for repeat offenders and for offenders who use a firearm in the commission of a violent felony. Moreover, the Bureau suggests there will be a significant impact on its resource requirements as a result of the elimination of parole and the establishment of sentencing guidelines by the new federal Sentencing Commission. *Id.* at 2-3.

59. Armstrong, *supra* note 56, at 239.

60. *Id.*

61. *Id.* at 239-40.

62. Frankel & Orland, *supra* note 13, at 232.

63. See S. REP. NO. 225, *supra* note 1, at 175. In formulating sentencing guidelines, the Commission is to keep in mind the available capacity of existing correctional facilities. The intent of this directive is not to limit the Commission's authority in recommending guidelines that it believes will best serve the purposes of sentencing. Rather, the intent is that the Commission be aware of prison capacity so that it is not inadvertently exceeded. Thus, the Commission may recommend changes in prison capacity that it considers necessary in light of its proposed guidelines. *Id.*

64. von Hirsch, *Constructing Guidelines for Sentencing: The Critical Choices for the Minnesota Sentencing Guidelines Commission*, 5 HAMLINE L. REV. 164, 177 (1984). The author points out in this article that the tension that would arise from a further increase in the existing strain on prison capacity without an accompanying expansion in correctional facilities would

guidelines propose lenient sentences that would be inadequate in meeting the defined purposes of sentencing, the Commission runs the risk that the proposed guidelines will be rejected by Congress.⁶⁵

To alleviate the potentially adverse impact of presumptive sentencing guidelines on prison capacity, the Minnesota Sentencing Guidelines Commission applied prison population constraints in developing its guidelines formula.⁶⁶ The Commission determined that ninety-five percent of capacity would be the maximum occupancy rate for its prisons⁶⁷ and resolved to structure guidelines that would not exceed this rated capacity.⁶⁸ To accomplish this, the Commission developed a prison population model that enabled it to assess quantitatively the effect of various sentencing options on projected prison populations over a five-year period.⁶⁹ Thus, Minnesota was able to modulate its guidelines and produce sentencing recommendations that would not exceed the rated prison capacity.⁷⁰

inevitably force correctional authorities or the courts to take some corrective action to alleviate the problem of overcrowding. *Id.* at 177. The likely result would be either discretionary release of prisoners by corrections boards or mandatory reductions in prison population by the courts. *Id.* Either action would lead to an erosion of the guidelines and a diminishing of the Commission's influence over the time offenders would actually serve in prison. *Id.*

65. *Id.* at 178. "The pressures to adopt stances of symbolic toughness are strong and will be felt by any rulemaker." *Id.* To illustrate this point, the author refers to the recent experience of the Pennsylvania Sentencing Commission that encountered difficulties in defending its guidelines proposal against demands for tougher penalties. The state legislature ultimately rejected the proposed guidelines on the basis that they were not stringent enough. *Id.*

66. See MINN. IMPACT REP., *supra* note 24, at 87-96. See also von Hirsch, *supra* note 64, at 176.

The legislature, in the enabling statute, has called upon the Commission to take correctional resources, including prison capacities, "into consideration." The statute did not, however, specify what role or weight should be given this factor. The Commission thus had the choice of either adopting a firm population constraint, or of merely taking prison populations into account as one among other considerations in fashioning the Guidelines' overall severity levels. It was the Commission which decided, as a matter of policy, to adopt the firm constraint.

Id.

67. Frankel & Orland, *supra* note 13, at 239.

68. von Hirsch, *supra* note 64, at 176. The Minnesota Commission's legislative mandate directed that state correctional resources including prison capacities be taken "into consideration" in developing sentencing guidelines. *Id.* Thus, the Commission was free to determine whether prison population would be one of several factors to be considered in determining the severity level of sentences under the guidelines or whether prison capacities should be a primary concern and thereby dictate the severity of the recommended sentencing ranges. *Id.* Minnesota chose to adopt prison population constraint. *Id.* In developing its guideline model, the Commission adjusted sentencing ranges so as to produce a sentencing scheme that would not exceed the rated capacity of the prison population. *Id.*

69. See MINN. IMPACT REP., *supra* note 24, at 87-96. See also Frankel & Orland, *supra* note 13, at 239 n.80.

70. See MINN. IMPACT REP., *supra* note 24, at 87-96.

The prison population constraint model produced by the Minnesota Commission has been successful in maintaining the prison population within the state's rated prison capacity⁷¹ and deemed worthy of emulation by other sentencing commissions.⁷² The Minnesota Commission reports that despite early predictions that sentencing practices under the guidelines would lead to prison overcrowding, the Commission, working in conjunction with the legislature, has managed "to avert the projected crisis in prison populations."⁷³ Moreover, prison population constraint has been instrumental in coordinating sentencing policy with correctional resources⁷⁴ and has increased the recognition of prisons as a scarce resource.⁷⁵

In contrast to Minnesota, the New York Sentencing Guidelines Committee did not interpret its legislative mandate as a directive that proposed sentences conform to currently planned prison capacity.⁷⁶ The Committee

71. See generally *id.* at 87-96. During the first three years of operation under the guidelines, the prison population in Minnesota has been maintained within the capacity of the state's correctional facilities. *Id.* The Commission predicts that populations will continue to stay within the program's capacity for at least the immediate future. *Id.* at 96.

72. Frankel & Orland, *supra* note 13, at 239.

73. See Knapp, *What Sentencing Reform in Minnesota Has and Has Not Accomplished*, 68 JUDICATURE 181 (1984). During 1981, the first year of operation under the guidelines, prison commitment levels dropped from nearly 100% of capacity to approximately 93% of capacity. *Id.* at 188. In 1982, however, commitments increased and returned to the near capacity, preguidelines level. This rise in commitment levels was attributed to several factors: (1) an increase in imprisonment of property offenders; (2) changes in plea charging practices; (3) an increase by the legislature in the mandatory minimum sentence for felonies committed with a handgun; and (4) a slight increase in the number of offenders moving through the system. *Id.* at 187-89. Projections based on sentencing practices in 1982 indicated that if these practices were to continue prison populations would increase and result in serious overcrowding. *Id.* at 188. The Commission was determined to avoid this outcome and, working in conjunction with the legislature, implemented several changes to avert the predicted problem of overcrowding. First, the legislature made the "good time" statute applicable to the new mandatory minimum for handgun offenses, thereby reducing the term of imprisonment for the mandatory minimums passed in 1981. *Id.* Second, the legislature revised the definition of subsequent offense to restrict its application. *Id.* Third, reductions in guideline durations were made retroactive to prison inmates. *Id.* And, fourth, the Commission modified the guidelines by reducing sentence durations for the least serious property offenses and by providing credit for jail time served as a condition of probation. *Id.* See also MINN. IMPACT REP., *supra* note 24, at 88-96.

74. Knapp, *supra* note 73, at 189. Cf. Frankel & Orland, *supra* note 13, at 238-39. The authors note that the general tendency of legislatures is to make a distinction between the function of judges, which is to order offenders to prison, and the function of correctional institutions, which is to ensure the availability of prison space to carry out the judgments. *Id.* at 239. The result has been to separate functions that are intrinsically inseparable. *Id.*

75. See von Hirsch, *supra* note 64, at 177-78. See also Frankel & Orland, *supra* note 13, at 239 ("If Minnesota had attempted nothing more, it would have supplied notable leadership in recognizing . . . punishment 'is not a cost-free good.'").

76. N.Y. DETERMINATE SENTENCING REP., *supra* note 25, at 140. New York's legislative mandate, like Minnesota's, directed the Commission to take available state correctional resources into consideration in formulating sentencing guidelines. Act of July 28, 1983, ch.

reasoned that to do so would result in a recommendation to reduce the use of incarceration—a recommendation the Committee viewed as a function properly within the jurisdiction of the legislature.⁷⁷ Consequently, the New York Committee chose to recommend sentences that would place no greater demand on the state's correctional resources than were present under the existing determinate sentencing structure.⁷⁸

The New York Committee developed a sentencing model, on the basis of several assumptions,⁷⁹ which simulated an inmate growth rate over a five-year period under the proposed guidelines that would be relatively similar to the growth rate produced by the indeterminate sentencing system.⁸⁰ The Committee recognized an inherent flaw in the proposed simulation in that it was impossible to assess precisely whether the several assumptions on which

711, 1983 N.Y. Laws § 2.4, *reprinted in* N.Y. DETERMINATE SENTENCING REP., *supra* note 25, at 159. This general statutory language left the Commission free to decide whether prison population should be a controlling factor or merely one of several factors to be considered in developing a sentencing guideline model. Whereas Minnesota took this language to mean that sentencing guidelines were not to exceed the state's rated prison capacities, *see supra* note 68 and accompanying text, New York determined that the capacities of state correctional facilities was one of several factors to be weighed in determining the severity level of the sentences recommended under the guidelines.

77. *Id.* The New York Committee viewed its authority as a limited one. It did not interpret its power as extending to the right to recommend a reduction or expansion of the state's correctional facilities. It saw this as a budgetary function solely within the purview of the state legislature.

78. *Id.* Under New York's current indeterminate sentencing system, state correctional facilities are operating at 110% of capacity. *See* N.Y. DETERMINATE SENTENCING REP., *supra* note 25, at 134. Assuming court commitments remain constant, the state's prisons would continue to operate at the same excess rate of capacity under the guidelines. Thus, the guidelines would place no greater strain on existing correctional resources. If, however, commitment rates were to increase under the guidelines then the rated capacity would similarly rise, or exceed the 110% of capacity that presently exists. By contrast, the Minnesota Commission determined that commitment levels under its guideline model would not exceed 95% of capacity. If commitment levels were to increase under the Minnesota guidelines and produce an accompanying rise in prison capacities, the Commission would revise its sentencing recommendations so as to maintain the 95% rated capacity. This is precisely what occurred in Minnesota. When commitment rates began to increase under its guidelines the Commission modulated them and thus managed to keep the prison population within its rated capacity. *See supra* note 73 and accompanying text.

79. *Id.* at 142. The Committee modeled the impact of the proposed guidelines upon several assumptions. The assumptions were as follows: the guidelines took effect on January 1, 1983; the under-custody population would be aged out on the basis of same time served estimates as those used for current law; incoming court commitments would receive sentences at the midpoint of the proposed sentence range; there would be no departures from the proposed sentencing ranges; all offenders would accrue three-fourths of the maximum good time allowable; and, in those cases where the proposed sentence provided for an alternative to imprisonment, it was assumed that those cases receiving a non-prison sentence would be proportionate to the cases that received a non-prison sentence in 1983. *Id.*

80. N.Y. DETERMINATE SENTENCING REP., *supra* note 25, at 140-46.

the model depended would accurately reflect actual sentencing practices by judges under the guidelines.⁸¹ In the absence of any assurance as to how the new system would operate in practice, the Committee recommended vigorous monitoring of the guidelines and suggested the legislature provide an early-warning mechanism that would alert policy makers to anticipated increases in the prison population and thereby afford them adequate time to respond to these changes.⁸² The New York Committee also requested that it be empowered to implement certain changes to the guidelines subject to a legislative veto,⁸³ rather than being restricted to propose only legislative alternatives that would be ineffective unless enacted by the state.⁸⁴

The problem of prison overcrowding in a determinate sentencing system is one of two competing interests; scarce prison resources⁸⁵ are pitted against a policy that seeks greater protection for society by increasing the severity of sanctions imposed for criminal behavior.⁸⁶ Reconciling these goals is a difficult, if not impossible task. Some trade-offs appear inevitable.

The Minnesota Commission clearly elected to coordinate sentencing policies with correctional functions and thus modified its sentencing recommendations so as not to exceed the rated capacity of the state's prison population. The employment of the prison population constraint by Minnesota, however, is not surprising in light of the state's long-standing tradition of moderation in punishment.⁸⁷ In New York, where sentencing is more politicized,⁸⁸ prison population constraint was unacceptable to a constituency and legislature that favored stiffer penalties for crime.⁸⁹ The New York

81. *Id.* at 145-46.

82. *Id.* at 146-47.

83. If a legislative veto provision were incorporated in the Committee's statutory mandate, the Committee could make recommendations to implement changes in the guidelines that would have the force and effect of law unless expressly vetoed by both houses of the state legislature. *Id.* at 146.

84. *Id.*

85. See *supra* note 58 and accompanying text.

86. See Frankel & Orland, *supra* note 13, at 232-33.

87. von Hirsch & Hanrahan, *Determinate Penalty Systems in America: An Overview*, 1981 CRIME AND DELINQ., 289, 308. See also von Hirsch, *supra* note 64, at 179. Minnesota has relied upon sentencing sparingly. *Id.* The state's per capita prison use has been one of the lowest in the country. *Id.* The author cautions however, that the use of prison population constraint does not necessarily guarantee the sparing use of imprisonment.

Only in a state that has hitherto exercised restraint in the construction of prison space and the use of imprisonment will one get Minnesota's more modest sanction levels. If the same population constraint were applied in a jurisdiction that has historically been prodigal with imprisonment, it could lead to quite severe overall punishment levels.

Id.

88. von Hirsch & Hanrahan, *supra* note 87, at 308.

89. The New York Penal Law is replete with mandatory incarceration requirements.

Committee, however, was not unmindful of the potential problems that would arise if inmate commitments exceeded institutional capacity.⁹⁰ It therefore recommended close monitoring of the guidelines and implementation of additional safeguards if it appeared the guidelines would lead to severe overcrowding.⁹¹ In this sense, New York developed a somewhat modified version of prison population constraint by allowing for downward adjustments in the guidelines if a substantial increase in prison capacity was certain to occur.

The federal Sentencing Commission, like the commissions in Minnesota and New York, has received an express directive to consider the impact of guidelines on the capacity of correctional facilities.⁹² Congress made clear, however, its mandate was not intended to require the Commission to recommend a continuation of current sentencing practices; but, rather, was included to assure the Commission would adequately examine current sentencing practices so as to avoid "inadvertent" changes in those practices.⁹³ Thus, the federal Commission, in proposing its sentencing recommendations, need not apply the prison population constraint model of Minnesota and the modified version of that model employed by New York. While the Commission would be correct in so interpreting its legislative mandate, it cannot afford to ignore totally the lessons of Minnesota and New York. Federal prisons are already operating at excess capacity. If the Commission's sentencing recommendations impose any additional strain on correctional facilities, the likely result will be the circumvention of the guidelines by the courts. If the Commission is to avoid this result, it will need to do more than merely consider the impact of the guidelines on prison capacity. Some measure of coordination between sentencing recommendations and the capacity of correctional facilities is essential. For the Commission to act otherwise would be risky and irresponsible.

Some committee members urged that these mandatory minimum sentences be preserved under the guidelines. See N.Y. DETERMINATE SENTENCING REP., *supra* note 25, at 63. These members proposed that the punishment imposed should fit the crime and not the capacity of the state's penal institutions. *Id.* at 69. In their view, New York's mandatory sentences had ensured certainty of punishment, which is not only critical to modern penological thinking, but has also led to a significant reduction in serious crime. *Id.* at 75. Moreover, they suggested that a reduction in mandatory minimums would constitute a step backward in the fight against crime, undercut the recent efforts of the state legislature in enacting mandatory sentences, and significantly diminish public confidence in the criminal justice system. *Id.*

90. See generally *id.* at 140-49 (setting out the Committee's rationale and methodology in recommending sentences that would not exceed the state's currently planned prison capacity).

91. See *id.* at 146-47.

92. See *supra* note 63 and accompanying text.

93. See S. REP. NO. 225, *supra* note 1, at 61, 175.

III. DURATION OF SENTENCES

Congress cautioned the Commission in formulating its original set of sentencing guidelines that "in many cases, current sentences do not accurately reflect the seriousness of the offense."⁹⁴ Congress accompanied this warning with a directive that, "as a starting point," the Commission should determine the average sentence imposed in certain categories of criminal cases and the lengths of sentences actually served in those cases.⁹⁵ This mandate, however, makes clear that the Commission need not be bound by its findings of average sentences and may establish its own sentence ranges, provided they are consistent with the sentencing purposes defined by the statute.⁹⁶

Congress' recommendation that the Commission assess sentencing practices prior to the construction of its guidelines model makes good sense. An assessment of sentences actually imposed and the prison terms actually served under these sentences is an essential step in the formulation of determinate sentencing guidelines.⁹⁷ The purpose of this exercise, however, need not be a purely reflective one. This evaluation should provide the Commission with a barometer to gauge whether current sentencing practices would be consistent with the defined sentencing purposes of punishment, deterrence, incapacitation, and rehabilitation embodied in the new statute.⁹⁸

The Commission's mandate does not end here. It will ultimately have to determine the appropriate sanctions or sentence ranges to be imposed in a given criminal situation. In making these determinations the experiences of the New York and Minnesota sentencing commissions can provide some valuable guidance, as each applied a distinct approach in their guidelines development.

94. 28 U.S.C.A. § 994(m) (West Supp. 1985). See also S. REP. NO. 225, *supra* note 1, at 61 (advising the Commission that current sentences for some violent offenders are too low and that sentences for some property offenders are too high to serve the purposes of sentencing).

95. 28 U.S.C.A. § 994(m) (West Supp. 1985).

96. *Id.* For example, the Commission might conclude that first offenders convicted of nonviolent offenses were too often being sentenced to a term of imprisonment when a sentence to a term of probation in such cases might sufficiently carry out the necessary purposes of punishment, deterrence, incapacitation, and rehabilitation, particularly if a fine, restitution, or community service were imposed as a condition. On the other hand, the Commission might determine that white collar criminals frequently received lenient sentences on the basis that such offenders did not need to be rehabilitated. In these cases, the Commission might conclude that more severe sanctions should be imposed for purposes of deterrence and punishment. S. REP. NO. 225, *supra* note 1, at 177.

97. Forst, Rhodes & Wellford, *Sentencing and Social Science: Research for the Formulation of Federal Sentencing Guidelines*, 7 HOFSTRA L. REV. 355, 368 (1980).

98. See 18 U.S.C.A. § 3553(a)(2) (West 1985).

A. The Descriptive Approach

The "descriptive approach"⁹⁹ primarily views the construction of sentencing guidelines as a technical matter.¹⁰⁰ Generally speaking, it establishes a statistical relationship between the sentence to be imposed with factors representing the seriousness of the crime committed and the characteristics of the offender.¹⁰¹ It also incorporates multiple sentencing purposes.¹⁰² Overall, it recommends that sentencing reform begin by being modeled after current sentencing practices.¹⁰³

The New York Committee applied this approach in the development of its guidelines by setting sentence ranges that were designed to maintain the level of punishment produced under the current indeterminate system.¹⁰⁴ In proposing sentences that reflect current practice, the actual time served by defendants became the committee's "benchmark" for establishing sentence ranges under the guidelines.¹⁰⁵

The descriptive approach incorporates several attractive features: first, it utilizes the expertise of sentencing judges in formulating guidelines that are based on actual sentencing decisions; second, it minimizes disruptions in the

99. The descriptive approach to guidelines formulation was first proposed in 1978. The methodology is so defined because it relies on the use of data that furnishes descriptive indicators of the factors that underlie sentencing decisions and the weight accorded these several factors. It is distinct from a prescriptive approach to guidelines development that relies not on factors but on a philosophy or notion of what the correct sentence should be. L. WILKINS, J. KRESS, D. GOTTFREDSON, J. CALPIN & A. GELMAN, SENTENCING GUIDELINES: STRUCTURING JUDICIAL DISCRETION XIV, 7-8 (Feb. 1978) (reporting on the feasibility study) [hereinafter cited as L. WILKINS]. The descriptive approach to guidelines development has also been generally referred to as the "Albany approach." MINN. IMPACT REP., *supra* note 24, at 8.

100. MINN. IMPACT REP., *supra* note 24, at 8. See also L. WILKINS, *supra* note 99, at 12-19 (developing several sentencing models by calculating equations and sentencing patterns that are reflective of current practices).

101. Forst, Rhodes & Wellford, *supra* note 97, at 372. See also L. WILKINS, *supra* note 99, at XIV, 7-8 (providing a rationale for the selection of the appropriate offense and offender characteristics to be considered).

102. See MINN. IMPACT REP., *supra* note 24, at 8. The Minnesota Commission, in considering whether to adopt the descriptive approach to guidelines development, assumed this approach would incorporate multiple sentencing purposes of punishment, deterrence, incapacitation, and rehabilitation. Minnesota ultimately rejected this approach and chose a guidelines model with one dominant sentencing goal that was retribution. See *infra* notes 118-19 and accompanying text.

103. Forst, Rhodes & Wellford, *supra* note 97, at 371.

104. N.Y. DETERMINATE SENTENCING REP., *supra* note 25, at 58.

105. *Id.* Time actually served became the Committee's point of reference because terms imposed at time of sentencing do not accurately reflect the period for which an offender is incarcerated. Factors such as good time and parole decisions recommending early release often result in the offender serving a shorter term than that imposed by the sentencing court. *Id.*

criminal justice system by constructing sentence ranges around established sentencing norms; third, it bases sentencing guidelines on two well-established sets of sentencing criteria—the characteristics of the offense committed and those of the offender; fourth, its straightforward presentation allows individuals without statistical training to interpret the results; and finally, it provides judges with a concise picture of their decisions and an opportunity to examine, to evaluate, and to modify sentencing policy as they see fit.¹⁰⁶

Despite these attractive features, the descriptive approach has not been immune from criticism. Some critics contend that it institutionalizes the biases and injustices associated with an indeterminate system, rather than seeking to rectify these ills.¹⁰⁷ Others argue that it is irrational to assume that one sentencing norm can be derived from multiple sentencing goals without at least evaluating the individual merits of these contending philosophies.¹⁰⁸ It has additionally been rebuked because it purportedly underemphasizes the need to fit the punishment to the seriousness of the crime.¹⁰⁹

While these theoretical bases for discrediting the descriptive approach may have some validity, a more telling analysis of its value can be determined by examining the criticisms it provoked when applied in practice by the New York Committee. A minority of members argued that the Committee's methodology was faulty in structuring narrow sentence ranges around projections of time actually served, because the majority of state felony convictions resulted from guilty pleas that produced sentences of a lesser severity than those imposed when a defendant stands trial for the same offense.¹¹⁰ Some members also contended that the proposed sentence ranges severely undercut the state's mandatory minimum sentences and that departures from the guidelines by the judiciary would further exacerbate this reduction

106. Forst, Rhodes & Wellford, *supra* note 97, at 371-72.

107. MINN. IMPACT REP., *supra* note 24, at 8.

108. *Id.* at 9.

109. See Forst, Rhodes & Wellford, *supra* note 97, at 376. This criticism of the descriptive approach has been primarily advanced by Andrew von Hirsch. Professor von Hirsch's major criticism of this model is that it relies solely on quantifiable factors in determining punishment. He argues that punishment should be imposed "because it is right" and that the severity of the sanction should be directly proportionate to the seriousness of the crime or crimes committed. *Id.* (quoting A. VON HIRSCH, *DOING JUSTICE* 62-64 (1977)).

110. N.Y. DETERMINATE SENTENCING REP., *supra* note 25, at 73. These members asserted that an examination of the sentencing grid produced by the Committee revealed widespread reduction of minimum sentences. *Id.* For example, defendants who commit certain violent felony offenses but have no record of a prior felony conviction would be eligible for a jail sentence of as little as one day, whereas the current mandatory minimum requires that they serve a prison term of no less than 18 months for the offense. *Id.* These members additionally asserted that repeat felony offenders would receive more lenient treatment under the Committee's proposal, which recommended a sentence reduction in the majority of these cases to a level less than two-thirds of the present mandatory minimum. *Id.*

in mandatory minimums.¹¹¹ On the basis of these and other objections, the Committee upgraded sentence ranges for certain categories of offenses.¹¹² Overall, however, the proposed guideline ranges reflected the Committee's decision to model its guidelines after current sentencing practices and, in this respect, the guidelines followed the descriptive approach.

B. The Prescriptive Approach

The "prescriptive approach" to guidelines development primarily focuses on the philosophies and policy issues that underlie sentencing.¹¹³ It does not presume that current sentences should be a major influence in guidelines formulation but, rather, that current sentencing practices should be considered on par with other available sentencing options.¹¹⁴ The methodology applied under the prescriptive approach is impact analysis; it examines the consequence to the courts, corrections, and offenders in choosing one policy option over another.¹¹⁵

After considerable deliberation as to the appropriate approach to follow in its guidelines development, the Minnesota Commission settled on the prescriptive approach.¹¹⁶ In making this choice, the Commission reasoned that the development of guidelines should be shaped principally by policy considerations and rejected the view that guidelines formulation was a technical problem resolvable by the application of a mathematical formula.¹¹⁷

Once the Commission decided that policy considerations and an analysis of the impact of these considerations on the state's criminal justice system should influence guidelines development, it turned its attention to the selection of the appropriate policy to apply. The Commission determined that retribution, i.e., making the punishment imposed commensurate with the se-

111. *Id.* at 74. Some departure from the guideline recommendations is likely to occur. In Minnesota, for example, where the departure standard is nearly identical to the standard proposed in New York, judges departed from the presumptive guidelines sentences approximately 30% of the time. *Id.* Also, downward departures occurred more frequently than upward departures. *Id.* If downward departures are taken into account, the sentencing grid proposed by the Committee would lower mandatory sentences for literally every felony crime in New York. *Id.* at 75.

112. *Id.* at 65.

113. MINN. IMPACT REP., *supra* note 24, at 9. See also *supra* note 99 and accompanying text.

114. MINN. IMPACT REP., *supra* note 24, at 9.

115. *Id.*

116. *Id.* The Commission's decision to pursue the prescriptive approach followed from a staff recommendation outlining a research strategy that emphasized the development of public policy and the role of impact analysis in the Commission's work. *Id.*

117. *Id.* at 10.

riousness of the crime, would be its dominant sentencing philosophy.¹¹⁸ Although the Commission's formula also incorporated sentencing goals of deterrence, incapacitation, and rehabilitation, it assigned secondary importance to these multiple sentencing objectives.¹¹⁹

Prior to the implementation of the Minnesota guidelines, some critics had claimed that the structuring of determinate sentencing guidelines on the basis of a retributive philosophy would be unworkable.¹²⁰ This criticism pointed out the difficulty in equating crime seriousness with sentence severity or the limitation in quantifying a moral concept such as deservedness of punishment.¹²¹

Notwithstanding these pessimistic predictions of the effects of a prescriptive approach to guidelines development, a more accurate assessment of its value can be determined by examining the results of its implementation in Minnesota. Minnesota's emphasis on retribution, as its dominant sentencing purpose, produced guideline recommendations under which more offenders convicted of serious offenses against persons would be sent to prison with fewer offenders of property crimes being imprisoned.¹²² A three-year assessment of the guidelines shows that despite an initial increase in the percentage of offenders imprisoned for crimes against persons and an accompanying decrease in the imprisonment of property offenders, the commitment rates for both categories of offenders have reverted to those rates in effect under the

118. *Id.* at 12. Sentencing purposes of rehabilitation, deterrence, and incapacitation were also evaluated by the Commission in selecting a dominant sentencing goal. These purposes, however, were considered to be inappropriate. The Commission rejected rehabilitation as a dominant sentencing goal on the basis that it had been undermined as a primary sentencing purpose by the Commission's legislative mandate. Deterrence was rejected on the ground that there was limited understanding of the type of sentencing model that would best support this objective. The Commission also decided that incapacitation should be excluded as a primary sentencing purpose for both practical and ethical reasons. *Id.*

119. *Id.* at 12-14.

120. See generally Forst, Rhodes & Wellford, *supra* note 97, at 376-77 (pointing out the practical limitations in applying a retributive logic, which is subjective and difficult to quantify, to a determinate sentencing scheme). But cf. von Hirsch & Hanrahan, *supra* note 87, at 292 (suggesting that a useful purpose in establishing sentencing standards is to make sentencing more just and that justice demands the punishment be proportionate to the severity of the criminal conduct).

121. Forst, Rhodes & Wellford, *supra* note 97, at 376-77. As the authors explain:

[T]he specific mechanics of how to link crime seriousness to sentence severity are unclear. While crime seriousness scaling has evolved as a widely accepted practice, the actual process of scaling sentence severity and translating crime and offender seriousness into sentence severity is difficult to envision. Norval Morris sums up these problems succinctly: "Desert is, of course, not precisely quantifiable."

Id. (footnotes omitted) (quoting N. MORRIS, *THE FUTURE OF IMPRISONMENT* 75 (1974)).

122. MINN. IMPACT REP., *supra* note 24, at 21.

indeterminate sentencing system.¹²³ The Commission attributes this reversion to a change in prosecutorial practices under the guidelines and to the discretionary use of nonimprisonment sanctions by the courts.¹²⁴

These initial results in Minnesota suggest the prescriptive approach, as predicted, has encountered difficulties. Adaptive responses to the guidelines by prosecutors and the courts have frustrated the achievement of the Commission's goal to make sentences reflective of the seriousness of the offense committed. Moreover, the Commission is now left with the difficult choice of either modifying its underlying policy considerations or restricting those practices that it claims have impeded the desired goal of making sentences primarily retributive.¹²⁵

The descriptive approach, by comparison, may be faulted for preserving the status quo in current sentencing practices and for failing to equate punishment with the seriousness of the crime. It does, however, provide greater flexibility in guideline development by allowing for the consideration of multiple goals in sentencing.¹²⁶ It also allows for the future adjustment of the sentencing ranges initially recommended, if these are found to be inconsistent with sentencing objectives. This adjustment would be far easier to implement than a shift in policy. The descriptive approach will not be immune from criticism, particularly from those who believe current sentencing practices are not harsh enough.¹²⁷ These objections alone, however, do not provide a sufficient rationale to defeat federal guideline recommendations that, at least at the outset, would follow the descriptive approach.

IV. REGULATING PROSECUTORIAL DISCRETION

A frequent criticism of determinate sentencing is that presumptive guidelines will shift sentencing discretion from judges to prosecutors.¹²⁸ The theory is based on a presumption that sentencing dispositions will be controlled by prosecutors through charging and plea negotiating practices and thereby undermine the sentencing guidelines.¹²⁹ Congress sought to obviate this concern by directing the Commission to issue policy statements to guide sentencing courts in determining the acceptability of a plea bargaining agree-

123. *See id.* at 31.

124. *See* Knapp, *supra* note 73, at 189.

125. *Id.* ("Adaptive responses by implementing participants are to be expected. Policy-makers are left with the choice of using their authority to reassert policy goals or to modify policy goals, either actively by articulating new goals or passively by allowing de facto goals to emerge by default.")

126. *See supra* note 102 and accompanying text.

127. *See supra* note 109 and accompanying text.

128. S. REP. NO. 225, *supra* note 1, at 63.

129. *Id.*

ment.¹³⁰ By examining proposed plea agreements, judges could more ably guard against the use of plea bargaining to circumvent the guidelines.¹³¹

The presumption that determinate sentencing will automatically create a shift in sentencing discretion, however, is not a universally held belief.¹³² One contention is that, in the absence of any concrete evidence as to how prosecutorial decisions will effect determinate sentencing systems, the presumed imbalance in discretion remains an empirical question.¹³³ This theory further suggests that while guidelines will increase a prosecutor's influence in disposition, that alone will not undermine the guidelines, unless prosecutors elect to exercise their powers in a manner inconsistent with the underlying purposes of determinate sentencing.¹³⁴

It has also been suggested that the real concern with plea bargaining should not be whether it shifts sentencing discretion to the prosecutor, but, rather, whether it should be tolerated at all in a determinate sentencing system.¹³⁵ The argument under this philosophy is that if the entry of a plea negotiation is not viewed as a mitigating factor, then the validity of the entire practice of plea bargaining is brought into question under a determinate sentencing system where the underlying purpose is to treat similar defendants alike on the basis of their criminal conduct.¹³⁶

Both the Minnesota and New York guidelines commissions have been cautious in affecting any changes to their current plea bargaining practices. Minnesota opted against limiting prosecutorial power until it had an opportunity to study the reaction of prosecutors under the guidelines.¹³⁷ The

130. *Id.*

131. *Id.*

132. See generally von Hirsch & Hanrahan, *supra* note 87, at 312-15 (defining the problem with prosecutorial discretion in a determinate sentencing system).

133. *Id.* at 313. Although some studies are currently underway to examine the impact of presumptive sentencing guidelines, their results are yet unknown. *Id.* Until the states have had an opportunity to examine this problem and report their findings, any claims that an attempt to regulate sentencing decisions at one stage of the process will automatically shift discretion to another point in the process are speculative. *Id.*

134. *Id.*

135. See Frankel & Orland, *supra* note 13, at 235.

136. *Id.* If the objective of a determinate sentencing system is consistency in sentencing, then plea bargaining practices that tend to promote inconsistency in the treatment of offenders become less acceptable or may not even be acceptable at all. As the authors further point out:

With a sentencing commission and guidelines in place, we may have to reckon with the pressure to be consistent. If a guilty plea is not considered a mitigating factor in sentencing, the fundamental premise of plea bargaining becomes suspect and probably unacceptable. If the fundamental objective is to treat like defendants alike, the failure of prosecutors to do so becomes more painfully subversive than it has tended to seem until now.

Id.

137. See MINN. IMPACT REP., *supra* note 24, at 71-86. Although the Minnesota Commis-

Minnesota Commission has carefully monitored statewide prosecutorial practices since the implementation of its guidelines and continues to do so.¹³⁸ The Commission reports significant intra-county and inter-county variations in charging and negotiating practices.¹³⁹ The Commission, however, admits that its analysis of prosecutorial practices "is in its infant stage."¹⁴⁰ It recommends further observation of prosecutorial practices over a more extensive period in order to isolate the effects of changes within a county from the effects of changes produced by the guidelines.¹⁴¹ An investigation of the feasibility of developing plea negotiation guidelines is presently being conducted by the state legislature.¹⁴²

New York, like Minnesota, chose to monitor closely the operation of its guidelines and to examine their impact on the balance of sentencing discretion between prosecutors and judges.¹⁴³ The Committee found no evidence that a determinate sentencing structure would result in a significant increase in prosecutorial power.¹⁴⁴ Moreover, it concluded it could not accurately predict how prosecutors would respond to the new guidelines or adjust their plea bargain practices once the determinate sentencing model was implemented.¹⁴⁵

sion decided against imposing any constraints on prosecutorial practices, it was not unmindful of the interplay with plea bargaining techniques in a presumptive sentencing system. The Commission acknowledged in its report that prosecutorial power "unquestionably increased with the implementation of the Sentencing Guidelines." *Id.* at 71. The report points out that increasing a charge to a higher severity level would not necessarily result in a higher sentence, since the upper boundaries of sentences would be subject to evidentiary constraints. *Id.* However, prosecutors could mitigate sentences by reducing a charge to a lower severity level, as the lower presumptive sentence is unlimited. *Id.* Prosecutors could also affect sentence duration in cases of multiple offenses. *Id.* If a serious person offense is involved, a charging decision could result in a longer sentence through the imposition of a sentence to a consecutive term. *Id.*

138. *See id.* at 71-86.

139. *Id.* at 71.

140. *Id.* The Minnesota Commission also points out that its study of plea bargaining practices under the guidelines is "more descriptive than evaluative." The Report further states:

Empirical analysis of prosecutorial practices is in its infant stage and it will undoubtedly take a number of studies to reach the level of analysis that has been achieved regarding judicial sentencing practices. . . . Until empirical analysis can be conducted over a more extensive period it will be difficult to isolate the effects of changes within a county and the effects of policy changes outside the county such as the Sentencing Guidelines. This discussion constitutes a beginning toward an eventual, more thorough evaluation of prosecutorial practices.

Id.

141. *Id.* *See supra* note 137.

142. *See* MINN. IMPACT REP., *supra* note 24, at 86.

143. N.Y. DETERMINATE SENTENCING REP., *supra* note 25, at 101-02.

144. *Id.* at 101.

145. *Id.*

The federal Sentencing Commission, in comparison to the commissions in Minnesota and New York, has received an express mandate from Congress to provide judges with some guidance in overseeing prosecutorial practices under the guidelines.¹⁴⁶ While this directive is viewed as a necessary precaution against the nullification of the guidelines by plea bargaining practices, it is not clear that such a danger exists. At present, there is no evidence that the guidelines will be undermined by prosecutors, nor is there any proof that judicial discretion will be automatically displaced. Until the federal Commission has had an opportunity to examine and to evaluate the impact of plea negotiations under the guidelines, it should move cautiously in this area. Its recommendations to sentencing judges on evaluating plea agreements should ultimately rely on the facts and not on the arguments of what is likely to occur.

V. CONCURRENT VERSUS CONSECUTIVE SENTENCES

One important factor influencing the length of prison terms and their impact on federal prison capacity under the new guidelines will be whether judges elect to sentence defendants convicted of multiple offenses to concurrent or consecutive terms. In the absence of any statutory guidance, under current law, on the appropriateness of concurrent or consecutive terms, judges have been accorded broad discretion in sentencing offenders convicted of multiple offenses.¹⁴⁷ The new sentencing provisions will not remove this discretion entirely but, instead, seek to codify existing practices with one important caveat.¹⁴⁸ In deciding whether a sentence should run concurrently or consecutively, sentencing courts must consider the nature of the offense committed and the criminal history of the offender in conjunction with the statute's defined sentencing purposes, the sentencing guidelines, and any applicable policy statements of the sentencing commission.¹⁴⁹

The new sentencing law, with one limited exception,¹⁵⁰ provides that sentences to multiple terms of imprisonment may be ordered to run concurrently or consecutively whether imposed at the same time or while the defendant is serving another term.¹⁵¹ If the sentencing court is silent as to whether to impose a concurrent or consecutive term, the statute makes pre-

146. See S. REP. NO. 225, *supra* note 1, at 63.

147. *Id.* Existing law permits the imposition of either concurrent or consecutive sentences, but provides the courts with no statutory guidance in making the choice. *Id.*

148. See *id.* at 126-28.

149. *Id.* at 128.

150. The exception applies to criminal attempt. Consecutive terms of imprisonment may not be imposed for attempt or for an offense that was the sole objective of the attempt. 18 U.S.C.A. § 3584(a) (West 1985). See S. REP. NO. 225, *supra* note 1, at 126.

151. S. REP. NO. 225, *supra* note 1, at 126.

sumptions as to which term would be appropriate. Unless a statute requires otherwise, sentences for multiple offenses imposed at the same time are presumed to run concurrently, whereas sentences imposed at different times are presumed to run consecutively.¹⁵² The role of the Sentencing Commission with respect to concurrent or consecutive sentences will be to insure that the proposed guidelines reflect the appropriateness of imposing an incremental penalty in cases where the defendant is convicted of multiple offenses arising out of a single criminal transaction or multiple offenses committed at different times.¹⁵³

In determining the appropriateness of imposing incremental penalties, Congress suggested three possible scenarios illustrative of sentencing outcomes in multiple offense cases for consideration by the Commission.¹⁵⁴ If a defendant was convicted of multiple commissions of the same offense, the guidelines may recommend a sanction slightly in excess of the proposed guideline sentence for a single commission of the offense.¹⁵⁵ If, however, sentencing was for two separate offenses committed at different times, the Commission may recommend that the sentencing court order the sentence to run consecutively.¹⁵⁶ On the other hand, if the conviction is for one offense that was committed in the course of the commission of another unrelated offense, the guidelines may advise either an incremental penalty over the proposed sanction for one offense or the aggregation of the recommended sentences for each offense.¹⁵⁷

These proposals, however, are purely advisory and do not serve as an explicit directive to the Commission. The Commission is granted considerable leeway under its legislative mandate in providing guidance to the sentencing courts in determining the appropriateness of imposing concurrent or consecutive terms.¹⁵⁸ Indeed, the Commission is precluded from issuing any policy recommendations in a total vacuum.¹⁵⁹ Consideration must be given to

152. *Id.* at 127.

153. *Id.* at 176-77. The Senate Report particularly notes the need for the Commission to consider the appropriateness of imposing an incremental penalty for an offense committed while a defendant is on release. *Id.* at 176. If no incremental penalty is provided, there would be no deterrent to the commission of a subsequent offense during the interval before the offender is called to account for the first offense. *Id.* at 176-77.

154. *See id.* at 127-28.

155. *Id.* at 127.

156. *Id.*

157. *Id.* at 127-28.

158. 28 U.S.C.A. § 994(1) (West Supp. 1985). The statute provides that the Commission shall insure that the guidelines reflect the appropriateness of imposing an incremental penalty for each offense in which a defendant is convicted of multiple offenses committed in the same course of conduct or multiple offenses committed at different times.

159. 18 U.S.C.A. § 3584(b) (West 1985). This section sets out the major purposes to be

whether guideline recommendations will reduce sentencing disparity—a goal the statute is committed to achieve.¹⁶⁰ Also, and probably more importantly, the Commission will need to assess the likely impact of its recommendations on concurrent and consecutive sentences on the current federal prison population.¹⁶¹ An examination of the New York and Minnesota sentencing commissions' treatment of the concurrent versus consecutive sentencing issue could prove useful to the federal Commission in weighing these important concerns.

The Minnesota Sentencing Commission recommended that in cases of multiple offenses, concurrent sentences would be the norm; the most severe sentence for which a conviction was obtained would dictate the appropriate sentence range to be imposed under the guidelines.¹⁶² Sentences to consecutive terms would be permissible, but not required, under a few, limited circumstances.¹⁶³ Any sentence to a consecutive term that failed to meet the guidelines' criteria in the limited case exceptions would constitute a departure from the guidelines and require a written explanation by the sentencing judge.¹⁶⁴

In recommending that the guidelines create a presumption in favor of concurrent sentences, the Minnesota Commission reasoned that consecutive sentences constitute a more severe sanction because their intent is to incarcerate an offender for a longer period.¹⁶⁵ Consequently, the Commission concluded that the imposition of consecutive sentences should be limited to more severe offenses, if the severity of the sentences is to be proportional to the seriousness of the offense.¹⁶⁶

A guidelines recommendation on the use of concurrent and consecutive sentences was never formulated by the New York Guidelines Committee because committee members were unable to reach a consensus on whether

considered by the Commission and the courts in determining the particular sentence to be imposed.

160. 18 U.S.C.A. § 3553(a)(6) (West 1985). Among those factors to be considered in imposing a sentence is "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." *Id.*

161. 28 U.S.C.A. § 994(g) (West Supp. 1985).

162. MINNESOTA SENTENCING GUIDELINES AND COMMISSION, MINNESOTA SENTENCING GUIDELINES AND COMMENTARY 22 (Aug. 1, 1984) (on file at the Catholic University Law Review).

163. *Id.* Consecutive sentences may be imposed in cases of multiple felony conviction that involve a crime against a person or crimes against different persons or when the conviction is for escape from lawful custody. *Id.*

164. *Id.*

165. *Id.* at 23.

166. *Id.*

existing law provides adequate guidance and clarity in this area.¹⁶⁷ The Committee acknowledged, however, that guidance should be provided to the sentencing courts, beyond that furnished by statute and case law, in cases where multiple offenses are committed in the course of a single criminal transaction.¹⁶⁸ The Committee also noted that, in the absence of a uniform statewide rule governing the imposition of concurrent and consecutive sentences, the guidelines would not be effective in avoiding disparate sentencing practices.¹⁶⁹ Although the Committee initially left this issue unresolved, the matter has been referred for further study.¹⁷⁰

In addressing the issue of concurrent and consecutive sentences, the federal Commission hopefully will avoid a protracted debate on the adequacy of statutory and case law, as the New York Committee did. Indeed, the Commission's legislative mandate implies it should look beyond statutory provisions and play a decisive role in providing specific guidelines to the sentencing judges on this issue.¹⁷¹ If disparity in sentencing is to be avoided, a uniform policy on concurrent and consecutive sentencing terms should become a reality and not a postponed goal.

Assuming the Commission perceives this to be its initial responsibility, then its focus will be whether the guidelines should presume sentences to concurrent terms, sentences to consecutive terms, or some combination of both. The Minnesota Commission offered a sound rationale for a presumption favoring concurrent sentences in concluding that the severity of the sanction should be tied closely to the seriousness of the offense committed. Two additional rationales would support this conclusion. First, a presumption toward consecutive sentences, or harsher penalties, would tend to favor the retributive purposes of sentencing over the other defined sentencing purposes of incapacitation, deterrence, and rehabilitation. Second, if consecutive sentences become the norm, rather than the exception, this choice would likely trigger an increase in the already overextended capacity of federal prisons. The federal Commission may, as Minnesota did, want to specify some situations that would warrant the more severe sanction of consecutive sentences. A presumption favoring concurrent sentences, however, would be the most prudent and rational choice.

VI. CONCLUSION

The development and implementation of a new federal sentencing policy

167. N.Y. DETERMINATE SENTENCING REP., *supra* note 25, at 109.

168. *Id.*

169. *Id.*

170. *Id.*

171. See S. REP. NO. 225, *supra* note 1, at 63.

that is intended to provide greater uniformity, fairness, and certainty in federal sentencing practices will be a formidable undertaking. While Congress has provided the federal Sentencing Commission with the necessary framework to accomplish this goal, the Commission's task will be to construct from this foundation a cohesive sentencing guidelines policy that will be workable, balanced, and fair. Although the determinate sentencing models produced by Minnesota and New York will provide some guidance to the federal Commission, the experience of these sentencing commissions suggests that there will be no readily available formula for the federal Commission to apply in the development of its sentencing guidelines system. Delicate balances must be struck between the need to ensure that convicted offenders receive certain punishment without overburdening the capacity of the federal prison system. A decision must be made as to the appropriateness of adopting a descriptive or prescriptive approach in determining the actual sentences to be imposed under the guidelines. Consideration must also be given to whether broader discretion will be automatically conferred on federal prosecutors in plea bargaining as a consequence of narrowing judicial discretion in sentencing decisions. In addition, a determination must be made as to the appropriateness of imposing sentences to either concurrent or consecutive terms of imprisonment for the commission of multiple offenses. There will be no easy solutions to these issues, and the federal Sentencing Commission, like the commissions in Minnesota and New York, will be confronted with some difficult choices. In addressing these concerns anew, the challenge to the federal Commission will be to build on the experiences of Minnesota and New York and develop a federal sentencing policy that will serve as a model of determinate sentencing reform.

Janet Alberghini

